

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF KANSAS**

**Perry H. Bacon Trust et al.,**

**Plaintiffs,**

**v.**

**Transition Partners, Limited,**

**Defendant  
and Third-Party Plaintiff,**

**Case No. 03-2310-JWL**

**v.**

**Wachovia Securities, LLC; Scott P. Carson;  
Douglas K. Roesner; Raymond F. Freeman; and  
William Critchfield,**

**Third-Party Defendants.**

**MEMORANDUM & ORDER**

Plaintiffs filed suit against defendant alleging that defendant violated K.S.A. § 17-1255 by materially aiding in the sale of unregistered securities of U.S. Medical, Inc. Thereafter, defendant filed a third-party complaint against Wachovia Securities, Scott P. Carson, Douglas K. Roesner, Raymond F. Freeman and William Critchfield. On January 8, 2004, the court granted summary judgment in favor of defendant and dismissed plaintiffs' complaint in its entirety. The court also granted Scott P. Carson's motion to dismiss—the only motion that had been filed by a third-party defendant.

After judgment was entered against plaintiffs, the remaining third-party defendants filed motions to dismiss the third-party complaint filed by Transition Partners. In response, Transition

Partners asserted that the motions to dismiss should be granted, but only if plaintiffs declined to appeal the court's decision. In essence, then, Transition Partners requested that the court delay any ruling on the motions to dismiss until plaintiffs' time to file an appeal had expired and they had elected not to file an appeal.

Regardless of whether plaintiffs' appeal time has expired, the court grants the motions to dismiss filed by the remaining third-party defendants. The third-party complaint filed by Transition Partners against the third-party defendants is based solely on a theory of contribution. Thus, when the court dismissed plaintiffs' cause of action, "any claim based on indemnification or contribution necessarily fell by the wayside." *See Holcomb v. Allis-Chalmers Corp.*, 774 F.2d 398, 400 (10th Cir. 1985).

Finally, the third-party defendants request that the court award them their costs incurred in this action. Transition Partners objects to this request to the extent the third-party defendants seek to recover their costs from Transition Partners as opposed to plaintiffs. According to Transition Partners, it is the prevailing party in this action and plaintiffs are not; thus, any costs awarded to the third-party defendants should be assessed against plaintiffs rather than Transition Partners. In third-party practice, the issue of who qualifies as a prevailing party and who that party may have prevailed against is a complicated one. *See* 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2667, at 224 (1998). While the case law concerning the issue is sparse, the court has uncovered some cases supporting the argument that any costs awarded to the third-party defendants should be assessed against plaintiffs. *See, e.g., Bellsouth Telesensor v. Information Sys. & Networks Corp.*, 1995 WL 520978, at \*9 (4th Cir.

Sept. 5, 1995) (district court did not abuse its discretion under Rule 54(d) in ordering plaintiff to pay costs of third-party defendant); *American State Bank v. Pace*, 124 F.R.D. 641, 650-51 (D. Neb. 1987) (awarding costs in favor of third-party defendant against plaintiff); *Crist v. Dickson Welding Co.*, 1990 WL 130622, at \*2 (E.D. La. Aug. 31, 1990). In those cases, however, the third-party defendant had “vigorously defended” the actions of the original defendant and, thus, the assessment of costs against the plaintiff was “not inequitable.” See *American State Bank*, 124 F.R.D. at 650-51; see also *Bellsouth Telesensor*, 1995 WL 520978 at \*9 (third-party defendant incurred costs by defending its common interests with defendant/third-party plaintiff against plaintiff’s claim); *Crist*, 1990 WL 130622 at \*2 (awarding costs to third-party defendant and assessing those costs against the plaintiff where the third-party defendant “successfully asserted” the defendant’s defenses against the plaintiff); Wright, Miller & Kane, *supra*, § 2667, at 226. The court cannot say in this case that the third-party defendants vigorously contested plaintiffs’ claims against Transition Partners such that they should be deemed prevailing parties against plaintiffs. Indeed, these third-party defendants did not even file dispositive motions until after Transition Partners had prevailed on its motion against plaintiffs. Thus, the court declines to assess costs in favor of the third-party defendants against plaintiffs.

The question, then, is whether the court should award costs to the third-party defendants and assess those costs against Transition Partners. The court declines to assess costs against Transition Partners as Transition Partners did not fail on its third-party claims—those claims were simply extinguished when Transition Partners prevailed against plaintiffs. Thus, there is no basis to tax costs against it. See *Crist*, 1990 WL 130622, at \*3 (refusing to assess costs in favor of

third-party defendant against defendant/third-party plaintiff where defendant/third-party plaintiff was a prevailing party with respect to plaintiff and, thus, third-party complaint was simply moot).

For the foregoing reasons, the motions to dismiss filed by the remaining third-party defendants are granted but the requests for costs contained in those motions are denied.

**IT IS THEREFORE ORDERED BY THE COURT THAT** third-party defendants William Critchfield and Douglas K. Roesner's motion to dismiss (doc. #70) is granted; third-party defendant Raymond Freeman's motion to dismiss (doc. #71) is granted; and third-party defendant Wachovia Securities, LLC's motion to dismiss (doc. #72) is granted. Moreover, the third-party defendants shall bear their own costs.

**IT IS SO ORDERED.**

Dated this 27<sup>th</sup> day of February, 2004, at Kansas City, Kansas.

s/ John W. Lungstrum  
John W. Lungstrum  
United States District Judge